

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

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77-2098

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

NO. 77-2098

**On Appeal From the United States District Court
for the District of Connecticut**

JOHN RALLS,
APPELLANT

JOHN R. MANSON,
APPELLEE

APPELLEE'S BRIEF



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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CASES.....	i
ISSUES PRESENTED.....	v
STATEMENT OF THE CASE.....	1
ARGUMENT	
A-I. THE PETITIONER WAS NOT PREJUDICED AT TRIAL BY A REFERENCE TO HIS DISCONTINUANCE OF ANSWERING POLICE QUESTIONING AFTER BEING SO ADVISED BY HIS ATTORNEY.....	6
A-II. THE JURY AT TRIAL WAS NOT IM- PROPERLY INFORMED OF PETITIONER'S ALLEGED BAD CHARACTER, PRIOR BAD ACTS AND CRIMINAL RECORD.....	10
A-III. THE ADMISSION, ABSENT OBJECTION, OF HEARSAY REPORTS OF THREATS BY PETITIONER AGAINST THE VICTIM WAS NOT CLEAR ERROR OF CONSTITU- TIONAL DIMENSION.....	16
B. THE TRIAL COURT'S SUPPLEMENTAL INSTRUCTIONS TO THE JURY WERE NOT COERCIVE OR IMPROPER.....	17
C. THE PETITIONER HAS FAILED TO EXHAUST HIS STATE REMEDIES ON THE ISSUE OF THE ALLEGED IN- EFFECTIVE ASSISTANCE OF COUNSEL..	23
CONCLUSION.....	26

TABLE OF CASES

<u>Cases</u>	<u>Page</u>
Allen v. United States, 164 U.S. 492 (1896).....	21
Burruv v. United States, 371 F.2d 556 (10th Cir. 1967).....	19
Cameron v. Fastoff, 543 F.2d 971 (2nd Cir. 1976).....	25
Chapman v. United States, 547 F.2d 1240 (5th Cir. 1977).....	7, 8
Doyle v. Ohio, 426 U.S. 610 (1976).....	6
Field v. LaFevre, 584 F.2d 1102 (2nd Cir. 1977).....	24
Hale v. United States, 435 F.2d 737 (5th Cir. 1970).....	20
Jenkins v. United States, 380 U.S. 445 (1965).....	20
Jones v. Haskins, 450 F.2d 479 (6th Cir. 1972).....	14
Jones v. Swenson, 469 F.2d 535 (8th Cir. 1972).....	14
Malley v. Connecticut, 414 F.Supp. 1115 (D.Conn. 1976).....	24
Michelson v. United States, 335 U.S. 469 (1948).....	14
Minor v. Black, 527 F.2d 1 (6th Cir. 1976).....	8
Picard v. Connor, 404 U.S. 270 (1971).....	23

<u>Cases</u> (continued)	<u>Page</u>
Ralls v. Manson, 503 F.2d 491 (2nd Cir. 1974).....	1,9,15,17,21
Rickenbacker v. Warden, 550 F.2d 62 (2nd Cir. 1976).....	23
Spencer v. Texas, 385 U.S. 554 (1969).....	13,14
State v. Ralls, 167 Conn. 408 (1974).....	16,25
U.S. ex rel, Annunziato v. Deegan, 440 F.2d 304 (2nd Cir. 1971).....	25
United States v. Barash, 412 F.2d 26 (2nd Cir. 1969).....	19,21
United States v. Bermudez, 526 F.2d 89 (2nd Cir. 1975).....	21
United States v. Bilotti, 380 F.2d 649 (2nd Cir. 1967).....	22
United States v. Birrell, 447 F.2d 1168 (2nd Cir. 1971).....	21
U.S. ex rel, Boodie v. Herold, 349 F.2d 372 (2nd Cir. 1965).....	24
United States v. Bowles, 428 F.2d 592 (2nd Cir. 1970).....	20,21
United States v. Bozza, 365 F.2d 206 (2nd Cir. 1966).....	13
United States v. Brettholz, 485 F.2d 483 (2nd Cir. 1973).....	13
United States v. Cavallaro, 553 F.2d 300 (2nd Cir. 1977).....	13

<u>Cases</u> (continued)	<u>Page</u>
U.S. ex rel. Clark v. Zelker, 321 F.Supp. 1085 (S.D. N Y. 1971).....	16
United States v. Deaton, 381 F.2d 114 (2nd Cir. 1967).....	13
United States v. Fay, 350 F.2d 400 (2nd Cir. 1965).....	14
U.S. ex rel. Gentile v. Mancusi, 426 F.2d 238 (2nd Cir. 1970).....	25
United States v. Grady, 544 F.2d 598 (2nd Cir. 1976).....	13
United States v. Hale, 422 U.S. 171 (1975).....	7
U.S. ex rel. Hardy v. McMann, 292 F.Supp. 191 (S.D. N.Y. 1968).....	16
United States v. Harrington, 490 F.2d 487 (2nd Cir. 1973).....	15
United States v. Hynes, 424 F.2d 754 (2nd Cir. 1970).....	22
United States v. Kenner, 354 F.2d 780 (2nd Cir. 1965).....	19,22
United States v. Magnano, 543 F.2d 431 (2nd Cir. 1976).....	12,13
United States v. Martinez, 446 F.2d 118 (2nd Cir. 1971).....	19
United States v. Rao, 394 F.2d 354 (2nd Cir. 1968).....	20
United States v. Rodriquez, 454 F.2d 829 (2nd Cir. 1976).....	21

<u>Cases</u> (continued)	<u>Page</u>
United States v. Santiago, 528 F.2d 1130 (2nd Cir. 1976).....	12
United States v. Sawyers, 411 F.2d 930 (7th Cir. 1969).....	20
United States v. Semensohn, 421 F.2d 1206 (2nd Cir. 1970).....	8
U.S. ex rel. Serrano v. Smith, 394 F.Supp. 391 (S.D. N.Y. 1975).....	16
United States v. Sklaroff, 525 F.2d 1156 (5th Cir. 1977).....	7
United States v. Tyres, 487 F.2d 828 (2nd Cir. 1973).....	21

ISSUES PRESENTED

- A-I. WAS THE PETITIONER PREJUDICED AT TRIAL BY A REFERENCE TO HIS DISCONTINUANCE OF ANSWERING POLICE QUESTIONING AFTER BEING SO ADVISED BY HIS ATTORNEY?
- A-II. WHETHER THE JURY AT TRIAL WAS IMPROPERLY INFORMED OF PETITIONER'S ALLEGED BAD CHARACTER, PRIOR BAD ACTS AND CRIMINAL RECORD?
- A-III. WHETHER THE ADMISSION, ABSENT OBJECTION, OF HEARSAY REPORTS OF THREATS BY PETITIONER AGAINST THE VICTIM WAS CLEAR ERROR OF CONSTITUTIONAL DIMENSION?
- B. WHETHER THE TRIAL COURT'S SUPPLEMENTAL INSTRUCTIONS TO THE JURY WERE COERCIVE OR IMPROPER?
- C. WHETHER THE PETITIONER HAS FAILED TO EXHAUST HIS STATE REMEDIES ON THE ISSUE OF THE ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL?

STATEMENT OF THE CASE

The Appellee hereby adopts the Statement of the Case presented in the Brief for the Appellant, pp. 2-5.

In lieu of Appellant's Statement of the Facts (At Trial), however, and the emphasis placed therein on the circumstantial nature of the evidence against the Petitioner and the "tenuous" case against him, the Appellee would prefer to demonstrate the overwhelming weight of the evidence indicating Petitioner's guilt by quoting from Judge Lumbard's concurring opinion in Ralls v. Manson, 503 F. 2d 491, 495, 496 (2nd Cir. 1974), as follows:

"The uncontroverted proof produced by the state at the four day trial showed beyond any doubt that Ralls killed his mother-in-law by firing four bullets into her body at close range.

On Sunday, March 1, 1970, at about 1:00 or 1:30 in the afternoon, the body of a woman was discovered on the floor of a maroon Chevrolet parked behind the First National Store on Dixwell Avenue in Hamden, Connecticut. The woman, Barbara Howell, Rall's mother-in-law, had died of multiple gunshot wounds in the head and chest from a .32 caliber automatic pistol. The time of death was estimated to be between 9:00 and 11:00 that morning. A search of the Chevrolet revealed three .32 caliber shell casings. The only identifiable fingerprint in the car, taken from the right vent window, was shown to be Rall's thumbprint.

Ralls was separated from his wife Gwendolyn and lived at his parents' house with three daughters. Benjamin Rawls, Rall's father saw him leave the

house in his black Oldsmobile around 9:30 on the morning of March first. He was going to the deceased's house to pick up some of his daughter's clothes that had been left there. He returned shortly before 10:00. Benjamin Rawls saw petitioner talking with the deceased and a third man near the deceased's automobile, the maroon Chevrolet. Rawls later saw his son drive away in the Chevrolet with Barbara Howell. Rawls said that his son returned to the house around 3:00 that afternoon and left again around 6:00 or 7:00 that night. Benjamin Rawls also had previously told the police he had found a .32 caliber bullet on the floor in his son's room a few days before March first.

Ada Rawls, petitioner's mother, testified that her son came home at about 5:00 on the morning of March first. She told him to call his sister, who had received a letter to him from his wife. Ralls made the telephone call and was upset by the letter which was read to him. Ralls then went to his room to lie down. He got up around 9:00 and drove to Mrs. Howell's home to pick up the clothes, returned about 9:20 or 9:30 with the clothes, and left again. He came back about 3:00 that afternoon. Mrs. Rawls testified that she did not know about Ralls' feelings toward his mother-in-law, but she had previously told the police that Ralls had threatened to "get" his wife and mother-in-law.

Rall's daughter Sharon, aged 8, testified that her sister Michell, aged 5, had laid a gun on the floor of their bedroom in the presence of her sister Jacquelyn and herself. Jacquelyn, aged 9, testified that her sister had said that morning that their father was going

to hurt their grandmother, but that she asked him and he had said "no."

Gwendolyn Ralls, petitioner's wife, had left him in September 1969 after he had stabbed her in the leg. In May 1969 she had had Ralls arrested for aggravated assault when he hit her with a whiskey bottle. She also testified that petitioner had often threatened to kill her mother and herself.

Donald Rawls, the petitioner's brother, testified that on the two nights before March 1, his brother had shown him a gun, which his brother had said was a .32 caliber automatic. He also said that Ralls had told him that his wife would not live to see Monday, and that his mother had said that Ralls had told her that he would "get" both his wife and mother-in-law. Donald Rawls further testified that Ralls felt his mother-in-law had kept his wife from him.

Samuel Bowens testified that Ralls came to his apartment in West Haven on March 1 between 10:30 and 11:00. Ralls asked him to cash a \$500 U.S. Chemical Company check. Since Ralls owed him money, Bowens gave him about \$300 for the check. Ralls left at about 11:00. Bowens did not see any car driven by Ralls but did recall that Ralls said nothing about his car breaking down or running out of gas.

In February 1970 Charles Cook worked with Ralls at the U.S. Chemical Company, where Ralls was a production manager. One day he saw Ralls take a gun, which Cook thought was an automatic, out of a paper bag. Also, in February Donna Burkman, the office manager at U.S. Chemical, was told by Ralls that if he had had a gun "last night" he would have killed his mother, mother-in-law, and

three children. He said that his mother-in-law interfered with his marriage. After the murder, on March 2 and 3, Burkman found that two payroll checks made out to Ralls in advance and five blank checks, as well as \$80 in petty cash, were missing from the office. One of these checks was the check Bowens cashed.

Ralls was arrested on the afternoon of March 4. A search incident to arrest found the five checks taken from the U.S. Chemical Company. After being given the Miranda warnings and being booked, Ralls told detectives that on Saturday evening, February 28, his car broke down in front of a Dunkin' Donut Shop in West Haven. Hitchhiking, he was driven home by an unknown man. The next morning he started to walk to his mother-in-law's house, but was picked up and driven there by Jimmy Senior, a friend. Barbara Howell drove him home where they arrived at about 9:45. He had told her about his car running out of gas and asked her to take him to it. They stopped at an Atlantic gas station on the corner of Goodrich Street and Shelton Avenue where he filled a gas can that was in her car. They arrived at his car between 10:15 and 10:40. He poured the gasoline into his car's tank from the can, started the car, and returned the can. Barbara Howell then drove away and that was the last he saw of her. Ralls explained that he went into hiding because he knew that he would be blamed when he heard of the murder on the evening of March first.

Several witnesses contradicted Ralls' account of his whereabouts. Jimmy Senior testified that he saw Ralls on March 1 between 10:30 and 11:00, walking in a direction away from Dixwell Avenue.

Senior stopped his car and Ralls asked to be driven to his own car on Winchester Avenue, the street on which Barbara Howell lived. The ride took about three minutes.

To further contradict Ralls' story, a policeman from West Haven who was on duty the night of February 23 testified that there had been no complaints about a disabled car in front of the Dunkin' Donut Shop. An employee who arrived at the donut shop early on the morning of March 1 testified that he saw no car parked where Ralls said he had left his car. Likewise, the manager of the carwash next door testified that he saw no car parked there that morning. In addition, the two attendants who were working at the gas station where Ralls said he and Barbara Howell had stopped, testified that they knew Ralls and had not sold him or anyone else that morning any gasoline in a gas can. Finally, no gas can was found in Barbara Howell's car.

Ralls presented no evidence in his defense.

Thus, it is not surprising to find that no serious claim is made that Ralls is innocent. Indeed, no such claim could be made as every circumstance points to him as the killer of Barbara Howell."

A-1 - THE PETITIONER WAS NOT PREJUDICED
AT TRIAL BY A REFERENCE TO HIS
DISCONTINUANCE OF ANSWERING POLICE
QUESTIONING AFTER BEING SO ADVISED
BY HIS ATTORNEY.

At the conclusion of his direct examination
of Inspector McHenry, the following colloquy
occurred:

Q. [BY MR. SPERANDEO]: Did there
come a time when he [Ralls]
received a call from anyone at
the Hamden Police Department?

A. [BY INSPECTOR McHENRY] Yes.

Q. And who was it?

A. At 8:00 I received a call from
Attorney Schaffel, who stated
that he represented Mr. Ralls and
wanted to speak with Mr. Ralls on
the phone. I handed the phone to
John Ralls and he spoke to Mr.
Schaffel. When he got off the
phone, he stated on advice of his
attorney, he was not going to carry
on any further conversation with
the police. I respected his wishes
and terminated any further interview
with him.

Q. And that was the last contact you
had with him as far as interviewing
him?

A. Yes.

MR. SPERANDEO: You may inquire.

THE COURT: Before Mr. DeMayo pro-
ceeds, let me caution the jury
that after speaking with his

attorney, he had a perfect constitutional right not to discuss anything further with the officers. It is not to mitigate [sic] [militate?] against him. Go ahead, Mr. De-Mayo.

MR. DEMAYO: Thank you, your Honor.

(Tr. pp. 255-256; Joint Appendix, pp. 200-201).

The Petitioner here attempts to elevate this isolated, unobjected-to, and somewhat ambiguous reference to his invocation of his right to remain silent as error of constitutional dimension, despite the cautionary instruction by the trial court and the overwhelming weight of the evidence indicating Petitioner's guilt. The claim is predicated mainly on the cases of Doyle v. Ohio, 426 U.S. 610 (1976) and United States v. Hale, 422 U.S. 171 (1975), both of which, of course, occurred at least five years after Petitioner's trial in November of 1970.

The District Court concluded, based on its review of the record, that the testimony had been elicited by direction (rather than by inadvertence) but, nevertheless, found that such reference was so harmless to Petitioner's cause, in the overall context of his trial, that same did not raise to the level of a constitutional violation.

The testimony that a defendant remained silent under questioning doesn't automatically create constitutional error. In some cases it is entirely proper, c.f. United States v. Sklaroff, 525 F. 2d 1156, 1161-62 (5th Cir. 1977); Chapman v. United States, 547 F. 2d 1240, 1250 (5th Cir. 1977); United States v. Davis, 546, F. 2d 583 (5th Cir. 1977); Doyle v. Ohio, supra at p. 619 n. 11 (1976). In each instance,

it is necessary to determine the purpose for which the testimony is offered and the prejudicial effect of the testimony in the overall context of the Petitioner's trial.

In this case, Inspector McHenry testified of conversations he had with the Petitioner at the Hamden Police station. The purpose of the testimony was to explain why the conversation had proceeded only so far and then had terminated and that the Petitioner had been given an opportunity to speak with his lawyer.

This distinguishes this case from the cases cited by the Petitioner. In such cases as United States v. Semensohn, 421 F. 2d 1206 (2nd Cir. 1970) and Minor v. Black, 527 F. 2d 1 (6th Cir.), cert. denied, 427 U.S. 904 (1976), the purpose of the testimony was to discredit the exculpatory statement made by the defendant at trial. Such purpose was not present here. In fact, it could not have been since Ralls did speak freely to the police and gave a full statement to McHenry, prior to his cessation of the interview after conferring with counsel.

Also, since the Petitioner did not testify in his own behalf at trial, his eventual silence could not be used to discredit such testimony.

The distinction is important because in the cases cited by the Petitioner, the potential for prejudice is great, while in this case there was little possibility of prejudice. In the cases cited by the Petitioner the inference was that the defendant at trial was lying, since he would have told the story at the time of his arrest if it were true. Since Ralls spoke to the police at arrest and gave a statement, this inference is out of place.

In a similar case, the Fifth Circuit, in Chapman v. United States, supra, at p. 1250 (1977) found another prosecutorial question on the defendant's post-Miranda warning to be harmless

error, noting that:

"...When there is but a single reference at trial to the fact of defendant's silence, the silence is neither repeated nor linked with defendant's exculpatory story, and the exculpatory story is transparently frivolous and evidence of guilt is overwhelming, the reference to defendant's silence constitutes harmless error."

Other distinctions from the cases cited by the Petitioner are that here the trial court immediately, sua sponte, gave a cautionary instruction, informing the jury of the defendant's "perfect right" to remain silent; the absence of any objection from defense counsel and, finally, the absence of any indication that the prosecution stressed, or even made reference to, the silence in his summation to the jury. [The closing arguments were not transcribed but objectionable comments during summation are traditionally noted by counsel either when they occur during the arguments or at the close of same, and no such objections are recorded in the transcript here.]

Similarly, the overwhelming weight of the evidence indicating Petitioner's guilt (see Ralls v. Manson, supra, at pp. 495-496, Lumbard concurring) renders negligible the possibility that the Petitioner's case was prejudiced by this single reference to the Petitioner's silence.

In light of all the preceding, the District Court quite properly found that the possibility of prejudice to the Petitioner's cause was so slight that any error would not have been of constitutional dimension.

A-II - THE JURY AT TRIAL WAS NOT IMPROPERLY
INFORMED OF PETITIONER'S ALLEGED BAD
CHARACTER, PRIOR BAD ACTS AND
CRIMINAL RECORD.

The Petitioner here claims that his case was prejudiced by the testimony of Gwendolyn Rawls (Petitioner's wife), who was permitted to testify concerning prior acts of misconduct by the Petitioner.

As the Petitioner has indicated in his brief, Gwendolyn Rawls did testify during her direct examination by the State, and again on re-direct examination, that she personally had been stabbed by the Petitioner and assaulted at various times prior to her separation from him and prior to the death of Mrs. Rawl's mother, the victim in the present case.

The initial claim of a stabbing came in response to the prosecution's limited question, "Why did you go to New York?," to which she replied:

"...I had no other choice, because the reason why I left him is because he stabbed me in my arm. He stabbed me in my leg. I thought I would be dead. (Tr. p. 169; Joint Appendix, p. A-202)

At this point, defense counsel made no motion to strike the answer as unresponsive nor did he move for a mistrial or take any action which would indicate his displeasure with the answer of Mrs. Rawls.

Also asked during direct examination, absent any objection, was "Did he [the Petitioner] ever threaten your mother in your presence?," to which Mrs. Rawls responded, "Several times. He said that he would, you know, he would-he was going to kill both of us." (Tr. p. 170; Joint

App. p. A-203) On cross-examination of Mrs. Rawls by Mr. DeMayo she was asked if she had reported the aforementioned threats to anyone, to which she replied no. On re-direct examination, the prosecutor pursued the matter which had been opened by defense counsel's cross-examination, and asked:

"...Q. [BY MR. SPERANDEO] Mrs. Ralls, Mr. DeMayo asked if you reported these threats to anyone. Did you have occasion to call the police?

A. Yes, I called the police was May, in May for the aggravated assault charge.

Q. Is that when he stabbed you?

A. Yes. No. Not when he stabbed me. In May, aggravated assault, that's when he hit me with a Scotch bottle, and it was in September when he stabbed me.

Q. What year?

A. 1969 he stabbed me once on the 17th of September in the leg and then that following Friday, he came back and he said to me, he said, how stupid I was to stay here, he said, 'I gave you a chance and you didn't leave, so now I'm going to finish you up.' He took something like a paring knife out of the kitchen. I was in the bedroom with some culotte-type pajama on, and he shredded them. He, you know, took the knife and cut them in shreds, and this is the stab mark here on the arm, where he did it the last time, but he did it on the leg on that Wednesday."

(Tr. pp. 173-174; Joint App. pp. A-206-07)

Again, defense counsel did not object to any of Mrs. Rawl's testimony. It is obvious from the portions of the transcript cited that the prosecution's questions were of a much more limited nature than the rambling responses received. Furthermore, the trial court, sua sponte, instructed the jury as follows, after the witness had testified:

"May I say to the jury just a word. I know Mrs. Rawl's had testified here concerning a stabbing. This was introduced merely to show the reason for the separation and the reason for her fleeing or going to New York. He is not, however, on trial here for the stabbing. He is on trial for the homicide of Barbara Howell, and you will treat it in that fashion. Keep that in mind." (Tr. p. 176)

The Petitioner's failure to object to any of the preceding would surely preclude a finding of constitutional "clear error," particularly in light of the discretionary nature ascribed to such "prior crimes" questions in the review of federal court decisions within this Circuit. As this Court ruled, in United States v. Magnano, 543 F. 2d 431, 435 (2nd Cir. 1976)

"...Evidence of prior criminal acts is admissible unless offered solely to prove criminal character or disposition or the proffered evidence is of such a highly prejudicial nature as to overwhelm it's probative value. United States v. Santiago, 528 F. 2d 1130, 1134 (2d Cir.) cert. denied, 425 U.S. 972..."

and, United States v. Santiago, Id., at p. 1134:

"...Indeed, we have held that evidence of relevant similar acts, including other crimes, is admissible for all purposes

except to show defendant's criminal character or disposition. United States v. Brettholz, 485 F. 2d 483, 487 (2d Cir. 1973), ... United States v. Deaton, 381 F. 2d 114, 116 (2d Cir. 1967); United States v. Bozza, 365 F. 2d 206, 213 (2d Cir. 1966)."

See also this Court's recent decisions in United States v. Cavallaro, 553 F. 2d 300, 305 (2d Cir. 1977) and United States v. Grady, 544 F. 2d 598, 605 (2d Cir. 1976).

Since the proffered evidence was never challenged during Petitioner's state court trial, the precise purpose of same was never debated before the trial court. The trial court, of course, volunteered, in the cautionary instructions to the jury after Mrs. Rawls had testified, that the testimony only went to explain why Mrs. Rawls separated from the Petitioner and went to New York. As such, (had the issue been debated) it is clear that the prosecution could have claimed relevance for such testimony on the basis of motive, intent, design, etc., or any of several other common exceptions to the so-called "other crimes evidence" rule. Spencer v. Texas, 395 U.S. 554, 561, 87 S. Cr. 648, 17 L. Ed. 2d 606 (1967); United States v. Brettholz, 485 F. 2d 483, 487 (2d Cir. 1973).

In the absence of any objection at the trial court level, it is difficult to perceive how the error claimed here can be nominated as "plain error" of constitutional dimension here on appeal. The long-standing authority in this Circuit is that evidence of prior criminal acts is admissible unless offered solely to prove criminal character or disposition or the proffered evidence is of such a highly prejudicial nature as to overwhelm its probative value. See United States v. Magnano, *supra*, at p. 435. This long line of cases, similarly, had generally been developed in the interpretation

of federal court actions by the Court of Appeals exercising its supervisory power over the admission of evidence in the district courts. No authority has been cited by the Petitioner that he has been deprived of any constitutionally protected right by what occurred at his state court trial here.

REGARDING FINGER-PRINT CARD

The Petitioner also claims that the admission of the finger-print card into evidence, implying that he had a prior criminal record, denied him his right to a fair trial under the Fourteenth Amendment. To obtain relief in a federal habeas corpus proceeding a state prisoner must show a constitutional injury. Jones v. Swenson, 469 F. 2d 535, 538 (8th Cir. 1972); United States v. Fay, 350 F. 2d 400, 401 (2nd Cir. 1965). It is not enough that there is error in the state court, the error must be of constitutional dimensions. Jones v. Haskins, 450 F. 2d 479 (6th Cir. 1972).

The Supreme Court in Spencer v. Texas, 385 U.S. 554 (1969) held that a state procedure whereby the jury was told of prior convictions of the defendant was not violative of due process when the judge warned the jury that such information could be used only for sentencing purposes, not for deciding the guilt or innocence of the defendant. To decide that instructions by the court are inadequate to protect the rights of the defendant would threaten large areas of trial jurisprudence. Spencer, supra, at p. 562. In Michelson v. United States, 325 U.S. 469 (1948), the Supreme Court recognized that similar instructions "are no more difficult to comprehend or apply than those upon various other subjects ..." Id., at p. 485.

The trial judge in this case cautioned the jury twice that any evidence of past crimes was

not to be given any weight. After the prosecutor asked Mr. McDonald what the "C.S.P." number was, and received the answer that "It is a central bureau for all the criminal arrest records in the State of Connecticut," the trial court interrupted immediately, as follows:

"Just a moment. I ought to caution this jury at this particular time, that whatever it was, it might have been just a minor matter. I don't know the extent of it. It doesn't affect this case, nor is it introduced for that purpose." (Joint Appendix, p. A-209).

After defense counsel moved unsuccessfully, in the absence of the jury, for a mistrial, the jury returned to the courtroom. At this point, the court stated:

"...I want to caution the jury again, that I don't know what the extent it covers, whether it might have been some minor matter, or it may have been an application for employment. You are not to give it any more weight than that. This man is being tried here on this case only." (Joint Appendix, p. A-211)

The court could do little more, short of declaring a mistrial, to protect the rights of the Petitioner.

United States v. Harrington, 490 F. 2d 487 (2nd Cir. 1973) does not dictate a different result, for there this Court was using its supervisory power over the admission of evidence in a federal court. Ralls v. Manson, 503 F. 2d 491, 497 (2nd Cir. 1974) (Lumbard concurring). When a state prisoner habeas corpus petition is presented (as here), as distinguished from that

of a federal prisoner, the standard is a different one when determining whether the defendant's constitutional rights have been violated.

While the admission of such fingerprint cards is discouraged, such an incident during a trial in which the jury is properly advised and cautioned simply does not rise to constitutional dimension.

A-III - THE ADMISSION, ABSENT OBJECTION, OF HEARSAY REPORTS OF THREATS BY PETITIONER AGAINST THE VICTIM WAS NOT CLEAR ERROR OF CONSTITUTIONAL DIMENSION.

The Petitioner here claims that the hearsay testimony of Donald Rawls and of Gwendolyn Rawls about threats the defendant had made against the victim should not have been admitted in his state court trial. The issue was raised (as to Gwendolyn Rawls only - Donald Rawls' hearsay is an afterthought) to the Supreme Court of Connecticut, which rejected the claim because of the failure of defense counsel to either object or except properly. See State v. Ralls, 167 Conn. 408, 426-27 (1974).

Errors in a state court's evidentiary rulings are not grounds for habeas corpus relief "absent a showing of deprivation of some specific due process right or fundamental fairness." United States ex rel. Serrano v. Smith, 394 F. Supp. 391, 392 (S.D. N.Y. 1975); United States ex rel. Clark v. Zelker, 321 F. Supp. 1085 (S.D.N.Y. 1971); United States ex rel. Hardy v. McMann, 292 F. Supp. 191 (S.D.N.Y. 1968).

The statements were hearsay and probably should have been excluded. There is every reason to believe that if defense counsel had objected properly at the time of trial, said comments would have been excluded. But admis-

sion of such testimony did not deprive the Petitioner of a fundamentally fair trial. The hearsay was relatively unimportant, especially in view of the overwhelming weight of the other evidence indicating the guilt of the Petitioner. (See Ralls v. Manson, supra, at pp. 495, 496, Lumbard concurring).

B - THE TRIAL COURT'S SUPPLEMENTAL INSTRUCTIONS TO THE JURY WERE NOT COERCIVE OR IMPROPER.

The Petitioner claimed before the District Court, and now here, that the trial court's supplementary instructions to the jury were coercive and this violated his constitutional right to a fair trial.

The first supplemental instruction occurred two hours and forty-five minutes after the jury had begun deliberations. At about 5:00 P.M. the jury was called and the judge made the following statement to them:

"I have called you all because of the hour. I am not trying to hurry your deliberation at all. I want you to have enough time to consider them with all the thought that you can. However, I would like to know if it is a matter of a couple of hours, I can send out and get sandwiches. If it is a matter of more than that, and you want dinner, it can be arranged. I can send out and make those arrangements. I cannot allow you to leave before I have some kind of verdict.

You could readily see, if somebody got sick overnight, I would to declare a mistrial, and this case would have to start all over again. It would be an impossibility..." (Joint Appendix, pp. A-217, A-218)

At 8:07, the trial judge called the jury in and gave it a modified version of the so-called "Chip Smith" supplemental charge, even in the absence of a specific indication of any deadlock within the jury:

"THE COURT: Good evening ladies and gentlemen, I sense that you must be having a little difficulty in reaching your verdict. However, as I have told you time and again, your verdict must be unanimous. It is true, of course, that a verdict to which each juror agrees has got to be his own conclusion and not the mere acquiescence in the conclusions of his fellows.

I am not telling you what to do. I am going to send you back in. Follow that theory, that you will resolve yourselves to do your duty and follow the thought of other jurors whom, I am sure, are equally as wise and have heard the same evidence. You may return to the jury room, and I hope it has shed some light. (Joint Appendix, pp. A-218, A-219).

At 9:00 P.M., the jury returned and asked whether they were the sole judges of life and death, if they voted a murder one verdict. Upon receiving an affirmative answer, they returned ten minutes later with a verdict of second degree murder. (Joint Appendix, pp. A-220, A-221, A-222).

The Petitioner claims that the timing of the "Chip Smith" charge was improper because the jury did not have sufficient time to disagree and there was no sign of a deadlock. The charge came five hours and forty-five minutes after the beginning of deliberations. This Second Circuit has not set minimum time limits that a judge must let a jury deliberate before the "Chip

Smith" charge may be given. In United States v. Kenner, 354 F. 2d 780 (2nd Cir. 1965), cert. denied, 383 U.S. 958 (1966), the charge was given after three hours and forty-five minutes and this was upheld. Id. at 758. In a later case a footnote said that the minimum limits appeared to have been set in Kenner. United States v. Barash, 412 F. 2d 26, 32, n. 11 (2d Cir.), cert. denied, 396 U.S. 832 (1969). However, a year later the giving of the "Chip Smith" charge after only two hours and fifty minutes of deliberations was upheld. United States v. Hynes, 424 F. 2d 754 (2d Cir.), cert. denied, 399 U.S. 933 (1970). This Court held in Hynes that the minimum time limit would be determined by the complexity of the trial issues. Id. at 758. (It is reasonable to assume, in the present case, where evidence of the Petitioner's guilt was overwhelming - see Judge Lumbard's concurring opinion in Ralls v. Manson, 503 F. 2d 491, 496 (2d Cir. 1974) - that the jury, as indicated by its question about its power to decide life or death for the defendant, spent much of its time deliberating over whether the defendant should receive the death penalty, in this pre-Furman case.)

Nor is it error for the trial court to give the "Chip Smith" charge without actual evidence of jury deadlock. In a recent case, this Court held it was not error for the trial court in a bank robbery prosecution to give a "Chip Smith" instruction after three hours of deliberation and no sign of a deadlock. See United States v. Martinez, 446 F. 2d 118 (2d Cir.), cert. denied, 404 U.S. 944 (1971). The Court concluded that the giving of the charge was not more coercive than after an actual deadlock occurs. Id. at 119. In fact, the Tenth Circuit considers the giving of the "Chip Smith" charge before a deadlock occurs to be less coercive than waiting until after the deadlock occurs. See Burrupe v. United States, 371 F. 2d 556, 558 (10th Cir.) cert. denied, 386 U.S. 1034 (1967). It is difficult to understand how the instruction

given before a deadlock occurs is more coercive than one given after a deadlock occurs. If there is no deadlock, there is no known minority to coerce. Thus, the timing of the supplemental charge was not error.

It is axiomatic that a trial judge cannot coerce a verdict, Jenkins v. United States, 380 U.S. 445 (1965); United States v. Sawyers, 411 F. 2d 930, 932 (7th Cir. 1969), cert. denied, 396 U.S. 1017 (1970). It is necessary to view the circumstances and the context of the instructions to properly decide whether a particular instruction has had a coercive effect on the jury. Jenkins v. United States, 380 U.S. 445, 446 (1965); Hale v. United States, 435 F. 2d 737, 742 (5th Cir. 1970), cert. denied, 402 U.S. 976 (1971); United States v. Rao, 394 F. 2d 354, 356 (2d Cir.), cert. denied, 393 U.S. 845 (1968).

The statement by the trial judge in this case that "I cannot let you leave before I have some sort of a verdict" (Joint Appendix, p. A-218) comes close to the statement condemned in Jenkins v. United States, supra, "You have got to reach a decision in this case." The statement by a trial court that "...I think you should be able to reach a verdict" has been judged as not coercive. United States v. Bowles, 428 F.2d 592, 596 (2nd Cir.), cert. denied, 400 U.S. 928 (1970). The statement "...now, this is not a difficult case for you to decide and this jury ought to reach a decision in this case..." has also been judged as not coercive. Benscoter, supra, at p. 51.

There are several factors that differentiate the court's instruction in this case from the one uttered in Jenkins, supra. First, the jury was not deadlocked and there was no hint of a stalemate.

Therefore, it was impossible to coerce a minority that did not, ostensibly, exist.

Secondly, the judge carefully explained to the jury that he was not trying to hurry their deliberation and that they should carefully consider the arguments. Thirdly, the jury continued deliberations for four hours after receiving the first supplemental instructions. Evidence that the jury deliberated for a long time after receiving instructions tends to prove that they did not believe the statements were coercive. United States v. Barash, 412 F. 2d 26, 32 (2d Cir.), cert. denied, 396 U.S. 832 (1969). Finally, later instructions were given to the jury reminding them that the verdict must be the conclusion of each juror and not the mere acquiescence in the conclusions of one's fellow juror (Joint Appendix, p. A-219).

The Petitioner also objects to the sentence by the trial court that "...It would be an impossibility." What "it" refers to is ambiguous, but it can be construed as meaning that the jury would not be allowed to go home until a verdict has been reached. Ralls v. Manson, supra, at 498 (Lumbard, J. concurring). The reasons cited to hold the earlier statement non-coercive apply equally to this statement.

The Petitioner objects to the modified "Chip Smith" charge, claiming that it is coercive. The charge was first approved in Allen v. United States, 164 U.S. 492 (1896). It has been approved repeatedly since then. United States v. Rodriguez, 545 F. 2d 829, 832 (2nd Cir. 1976); United States v. Bermudez, 526 F. 2d 89, 99-100 (2nd Cir. 1975); United States v. Tyers, 487 F. 2d 828, 832 (2nd Cir. 1973), cert. denied, 416 U.S. 971 (1974); United States v. Birrell, 447 F. 2d 1168, 1173 (2nd Cir. 1971); cert. denied, 404 U.S. 1025 (1972). Despite the criticisms of some courts and commentators, the so-called "Chip Smith" charge is permissible.

The purpose of the charge is to encourage jury agreement, without causing a juror to abandon a conscientious conviction. Bowles, supra, at p. 596. It is the task of the courts to draw

the line between a charge that encourages and one that coerces. To prevent coercion, recent cases within this Circuit have required that the "Chip Smith" charge be supplemented (as here) with "an assurance in some form that a juror was not expected to abandon his conscientious convictions," United States v. Kenner, 354 F. 2d 780, 783 (2nd Cir. 1965). The test is whether the language is sufficiently clear that a juror ought not to abandon a personal conviction. United States v. Bilotti, 380 F. 2d 649, 654 (2nd Cir.), cert. denied, 389 U.S. 944 (1967). The trial court did that here, saying that each juror must reach his own conclusion and not acquiesce in the conclusions of other jurors. (Joint Appendix, p. A-219).

The Petitioner specifically objects to the language, "Follow that theory, that you will resolve yourselves to do your duty and follow the thoughts of other jurors, whom, I am sure are equally as wise and have heard the same evidence." (Joint Appendix, p. A-219). Such a statement, without assuring the jury that their verdict was to be their own conclusion, could be seen as coercive. But, when the statement is viewed as a whole it is not significantly different than other statements allowed in the past. "...if the much larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of some men equally intelligent, equally honest as himself." United States v. Hynes, 424 F. 2d 754, 757 (2nd Cir. 1970). "It certainly cannot be the law that each juror should not listen with deference to arguments and with a distrust of his own view, his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself." United States v. Kenner, supra, 354 F. 2d at p. 782 n.2. In view of all the above, in the context and under the circumstances in which the supplemental instructions were given, they cannot be viewed as having had a coercive impact upon the jury which heard

Petitioner's case and the District Court did not err in finding accordingly.

C - THE PETITIONER HAS FAILED TO EXHAUST HIS
STATE REMEDIES ON THE ISSUE OF THE
ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL.

In his Brief filed with this Court, the Petitioner seems to suggest that this would be the "perfect" case upon which to base an overturning of this Court's long-standing (but much-debated) see Rickenbacker v. Warden, Auburn Correct. Facility, 550 F. 2d 62, 65 (2nd Cir. 1976) adherence to the so-called "farce and mockery" standard of review in cases of alleged ineffective assistance of counsel and move on to some other, less restrictive standard. The Petitioner argues for this position in spite of the obvious deficiency (as pointed out by the District Court) in this claim - to wit, the Petitioner has simply failed to present many of the factors which, when combined, are supposed to demonstrate the ineffectiveness and inadequacy of his trial counsel to the courts of the State of Connecticut.

Under Title 28, Sec. 2254 (b) an application for habeas corpus review by the federal courts will not be allowed as to those claims as to which the Petitioner has failed to exhaust his state remedies. This means simply that "the substance of a federal habeas corpus claim must first be presented to the state courts." Picard v. Connor, 404 U.S. 270, 278 (1971). Picard, Id. at 276, requires more than that a general claim be made to the state court before the exhaustion of state remedies rules is satisfied:

"Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state

remedies. Accordingly, we have required a state prisoner to present the state court with the same claim he urges upon the federal courts."

As this Court has only recently stated, in Fielding v. LaFevre, 548 F. 2d 1102, 1106 (2nd Cir. 1977), regarding the exhaustion of state remedies requirements:

"This is not a formal hurdle placed in the way of meritorious claims, but an essential element of federalism in the administration of criminal justice. The state courts must be afforded an opportunity to set their own Constitutional houses in order before the power of the federal courts is invoked. See Note; Developments in the Law-Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1094 (1970). That policy is especially strong when, as here, the conduct of a state judge is sharply and directly called into question."

(Somewhat analogously, the claim made in the Petition relates to the adequacy of the representation afforded by the Public Defender's office, as same existed and functioned at the time of Petitioner's trial, circa 1970 - surely a matter in which the State of Connecticut must have an interest.)

The District Court's finding that, as to the ineffective assistance of counsel claims only, state remedies had not been exhausted, is not without precedent. See Malley v. Connecticut, 414 F. Supp. 1115, 1121 n. 14 (D. Conn. Blumenfeld, J. 1976); United States ex rel. Boodie v. Herold, 349 F. 2d 372, 374-75 (2nd Cir. 1965). There would seem to be no question but that this Court, in reviewing the District Court's finding, may consider those claims of the Petition as to which state remedies have

been exhausted, while declining to rule on the merits of those claims that have not been exhausted. See Cameron v. Fastoff, 543 F. 2d 971, 976 (2nd Cir. 1976); United States ex rel. Annunziato v. Deegan, 440 F. 2d 304, 305-06 n.1 (2nd Cir. 1971); United States ex rel. Gentile v. Mancusi, 426 F. 2d 238, 240 (2nd Cir. 1970).

The Petitioner alleges generally that he was denied the effective assistance of counsel at his state court trial. The Petition filed with the District Court listed eight omissions by trial counsel as constituting the inadequacy or ineffectiveness of counsel (See Joint Appendix, pp. A-23, A-24). In his memorandum in support of his application for habeas corpus relief (filed, understandably, after Petitioner had been able to discover further alleged omissions on trial counsel's part, based on his depositions of Petitioner; Mr. DeMayo, the Public Defender; and Mr. Donahue, his investigator) the Petitioner then predicated his claim of the inadequacy or ineffectiveness of counsel on the basis of fifteen omissions of trial counsel.

While appealing his conviction to the State Supreme Court of Connecticut, the Petitioner had based his claims of ineffective assistance of counsel on only five of the fifteen omissions in support of his Sixth Amendment claim that he raised in the District Court.

In short, the claim of inadequacy of counsel, as it exists now, after the fact-finding process allowed in the District Court, is radically different from any claim ever heard by the courts of the State of Connecticut. Should the Petitioner seriously desire to pursue this claim, an adequate remedy remains available to him through the habeas corpus provisions of the State court system. (See Sec. 52-466-52-470, Conn. Gen. Stats.) and the pre-existing finding by the Connecticut Supreme Court, (in State v. Ralls, supra, 167 Conn. at pp. 427-432; Joint Appendix, pp. A-243-A-248) would not be assertable in bar as to any such claim because, as

aforesaid, the State Supreme Court never considered a claim of ineffective assistance of counsel based on the fifteen grounds asserted in Petitioner's District Court Memorandum.

The District Court quite properly refused to consider this clearly unexhausted claim and referred the Petitioner back to the State courts.

CONCLUSION

For all of the foregoing reasons, the judgment of the District Court was a correct one and same should be affirmed.

Respectfully submitted,

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